IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 76-5325

BEN EARL BROWDER, Petitioner,

-vs-

DIRECTOR, DEPARTMENT OF CORRECTIONS
OF ILLINOIS, Respondent.

REPLY BRIEF OF PETITIONER BEN EARL BROWDER

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October 27, 1977

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

att: Ms. June Hoffman

re: Browder v. Director, No,76-5325

Dear Ms. Hoffman,

Kenneth Flaxman has asked me to send the following errata sheet in connection with the reply brief delivered to your office on October 26, 1977.

1. The line concluding page 3 should contain the word "timely" at its end. This line should read as follows:

be corrected on appeal,[3/] but only if notice of appeal was timely.

2. The first word of the first line on page 29 ("These") should not be capitalized.

3. 12 lines were omitted from the beginning of the material starting on page 35. The material to be inserted is attached to this letter.

Very truly yours,

John M. Kalnins
Assistant Public Defender

cc: Raymond McKoski, Esq.

JMK:so

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REPLY BRIEF OF PETITIONER BEN EARL BROWDER

Introduction

This case arises from the warrantless arrest of all the teen-age black males found in a dwelling; the arrests were made to determine which arrestee, if any, should be charged with an offense committed two days before. After the state courts had refused to adjudicate petitioner's claim that this arrest was unlawful, the United States District Court granted petitioner's application for a writ of habeas corpus, finding, inter alia, that the arrest was unlawful. The Court of Appeals reversed in an "unpublished order," and this Court granted certiorari to consider the Fourth Amendment issues, in addition to a number of other questions presented in the petition. The Fourth Amendment issues need not be reached, however, if the Court accepts our contention that the Director's notice of appeal was untimely to vest the court of appeals with jurisdiction to review the district court's final order. In this reply brief, we respond to the arguments raised by the Director, some of which we contend have been waived or abandoned in the district court and in the court of appeals.

I. THE COURT OF APPEALS LACKED JURISDICTION TO REVERSE THE FINAL ORDER OF THE DISTRICT COURT

The Director concedes that the district court's order of October 21, 1975 (App. 110) granting petitioner's application for a writ of habeas corpus indicates "that the matter was being concluded in the district court." (Resp.Br. 43.)[1/] This, of course, is the hallmark of a final order. See Bostwick v. Brinkerhof, 106 U.S. 1, 3-4 (1882). The two theories offered by the Director to explain its failure to have acted with the jurisdictional time limits of F.R.A.P. 4(a) to perfect an appeal from this final order, as authorized by 28 U.S.C. §2253, are equally devoid of merit.

1/ The Director refers (Resp.Br. 43) to the memorandum opinion of October 21, 1975 (App. 111-17) as the "order" in question. This is incorrect. The order granting the petition was entered on October 21, 1975 (App. 1), in a separate document. (App. 110.)

1. The Director contends that the order of October 21, 1975 was not final because "it left unresolved the statutorily prescribed question of whether an evidentiary hearing would be required on the petition." (Resp. Br.46.) This contention is frivolous -- the district judge obviously concluded that an evidentiary hearing was not required when he discharged his duty under 28 U.S.C. §2243 to "summarily hear and determine the facts" and granted the petition on the state court record.[2/] If the district court had erred in failing to hold an evidentiary hearing, this error could be corrected on appeal,[3/] but only if notice of appeal was

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2/ The power to grant a habeas corpus petition without an evidentiary hearing was explicitly recognized in Walker v. Johnson, 312 U.S. 284 (1941), and was subsequently codified in 28 U.S.C. §2243. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 498 (1973).

While the Rules Governing Section 2254 Proceedings are inapplicable to this case, see infra at 5 n. 6, we note that the power to grant a habeas corpus petition without an evidentiary hearing is specifically recognized in Rule 8(a) of these rules, which provides, in pertinent part: "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Thus, as the Court noted in Blackledge v. Allison, ___ U.S. ___, 97 S.Ct. 1621 (1977), a district judge "may employ a variety of measures to avoid the need for an evidentiary hearing." Id. at ___, 97 S.Ct. at 1633.

3/ See, e.g., United States ex rel. McNair v. New Jersey, 492 F.2d 1307, 1309 (3d Cir. 1974); Sosa v. United States, 550 F.2d 244, 250 (5th Cir. 1977). Cf. Dorszynski v. United States, 418 U.S. 424 (1974) (failure of district judge to have made explicit "no benefit" finding under Youth Correction Act, 18 U.S.C. §5010(d), reversed on review of final decision.

2. Alternatively, the Director argues that its motion to reconsider,[4/] filed 28 days after entry of the final order, tolled the time to appeal. (Resp.Br. 44 n. 17.) To accept this argument, the Court must reject the uniform decisions among the courts of appeals[5/] in favor of the Director's assertion that the tolling rules of F.R.A.P. 4(a) are inapplicable to habeas corpus proceedings. (Resp. Br. 46.) The Rules of Appellate Procedure, however, are fully applicable to habeas corpus proceedings, see F.R.A.P. 1, and the Director's argument to the contrary must be rejected.

The Director's argument is two fold. First, the Director asserts that the tolling rules of F.R.A.P. 4(a) are in "direct contravention" of Civil Rule 81(a)(2) and Rule 11 of the Rules Governing Section 2254 Proceedings. (Resp.Br. 46.) The Rules Governing Section 2254 Proceedings

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4/ While the Director claims that its post-final order request that the district court receive further evidence on the existence of probable cause was "far from being one for reconsideration" (Resp.Br. 43), that motion was predicated on the assertion that the district court had "erred in granting the writ without first conducting an evidentiary hearing." (App. 118, ¶2.) This, of course, was a request to reconsider disposition of the case without an evidentiary hearing. In denying this motion, the district court stated, in part, that "The motion to reconsider is denied." (App. 161.)

5/ See, e.g., Flint v. Howard, 464 F.2d 1084, 1086 (1st Cir. 1972); Rothman v. United States, 508 F.2d 648, 651 (3d Cir. 1975); Martin v. Wainwright, 469 F.2d 1072, 1073 (5th Cir. 1973); United States v. Braasch, 542 F.2d 442, 444-45 (7th Cir. 1976).

are inapplicable to this case,[6] and it is difficult to conceive of any way in which the tolling rules of F.R.A.P. 4(a) may be in "direct contravention" of Civil Rule 81(a)(2), which was amended in 1968 to delete "references to appellate procedure made inappropriate by the adoption of the Federal Rules of Appellate Procedure. Harris v. Nelson, 394 U.S. 286, 293 n. 3 (1969).[7]

Second, the Director relies on United States v. Dieter, 429 U.S. 6 (1976), and its application of the

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6/ Pub.L. 94-426, §1, 90 Stat. 1334 (September 28, 1976), made the Rules Governing Section 2254 Proceedings applicable to cases commenced on or after February 1, 1977. This case was commenced on January 8, 1975. (App. 1.)

7/ Prior to 1968, when the Federal Rules of Appellate Procedure became effective, appellate procedure was governed by local appellate rules and by the Rules of Civil Procedure. (Congress first vested this Court with explicit rule making authority over the courts of appeals in civil cases in 1966, Pub.L. 89-773, 80 Stat. 1323 (November 6, 1966).) Prior to that time, uniform rules for appellate procedure had been promulgated only insofar as practice in the district court pertained to appeals. See Stern, Changes in the Federal Appellate Rules, 41 F.R.D. 297 (1967).

Former Civil Rule 73 set out the time limits for the filing of a notice of appeal, and contained the tolling rules carried over into present Rule 4(a) of the Rules of Appellate Procedure. Former Civil Rule 81(b) expressly provided that the Rules of Civil Procedure governed appeals in habeas corpus cases:

> In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice is not set forth in statutes of the United States and has heretofore conformed to the practice in actions in law and suits in equity: admission to citizenship, habeas corpus . . .

tolling rules of United States v. Healey, 376 U.S. 75 (1964) to requests for reconsideration filed by the government in criminal cases. (Resp.Br. 44 n. 17.) There is no statute or rule governing the timeliness of a petition for rehearing in criminal cases, United States v. Healey, at 79, and a petition for rehearing is timely if filed prior to expiration of the time in which an appeal could be perfected. Id. at 77. F.R.A.P. 4(a), however, governs the timeliness of petitions for rehearing in habeas corpus cases, and as the Court noted in United States v. Dieter, supra, it is only "timely petitions for rehearing . . . [which render] the original judgment nonfinal for purposes of appeal." Id. at 8.

In this case, the petition for rehearing was not timely, and notice of appeal was not filed until 128 days had passed after entry of the final order. The court of appeals therefore lacked jurisdiction to review the final order of the district court, and the decision below must be reversed, and the case remanded to the district court to reinstate its writ of habeas corpus.

II. A COURT OF APPEALS MAY NOT DECIDE FACTUAL ISSUES DE NOVO

The Director recognizes (Resp.Br. 8) that the court of appeals reversed the decision of the district court on its independent appraisal of disputed facts. But rather than respond to our argument that a federal court of appeals may not decide factual issues de novo (Pet.Br. 23-25), the Director seeks to mislead the Court by stating that we do not contest the facts as found in the first instance by the court of appeals. (Resp.Br. 13-14.) This is incorrect. In our view, the court of appeals -- if it had jurisdiction to reach the merits -- should have viewed the record in the light most favorable to petitioner, the prevailing party in the district court, and reviewed the decision of the district court on the assumption that petitioner, along with the three other teen-age black males found in the Browder residence, had been arrested on the basis of "information" received from a "known informer," referred to in the police report. (App. 159, introduced into evidence at App. 148.) On these facts, as the district court found (App. 114), petitioner was the victim of an unlawful arrest. See Henry v. United States, 361 U.S. 98 (1959); Beck v. Ohio, 379 U.S. 89 (1964).

Determination of what facts were known to the police at the time of arrest was the duty of the district

judge.[8/] The district judge in this case was uniquely qualified to evaluate the testimony of law enforcement officers -- Judge Flaum came to the bench after a distinguished career as a prosecutor for Cook County, Illinois, as an assistant Attorney General of Illinois, and as First Assistant to the United States Attorney for the Northern District of Illinois. As the Director does in this Court (Resp.Br. 3-5), and as it did in the court of appeals, the Director had sought to convince Judge Flaum that the evidence presented at the evidentiary hearing proved that the police had probable cause to believe that the offender sought was either petitioner or his brother Tyrone Browder. (Record Item No. 32, 2-4). Petitioner vigorously disputed this contention, arguing that the police testimony was inherently incredible, that it was impeached by a contemporaneous arrest report, and that it was in irreconciliable conflict with testimony given by the officers at the state court trial. (Record Item No. 31, 3-7.) Judge Flaum refused to accept the Director's arguments, and reaffirmed his earlier decision to grant the petition (App. 161) -- a decision which had been based on the factual finding that there was "no basis upon which the arresting officer might have formed a belief that petitioner Browder raped Ms. Alexander." (App. 114.)

8/ See Mapp v. Ohio, 367 U.S. 643, 653 (1961): "Reasonableness is in the first instance for the [trial court] . . . to determine." (quoting United States v. Rabinowitz, 339 U.S. 56, 63 (1950)

In reversing the decision of the district court, the court of appeals did not explicitly decide that the district court had misapprehended the law -- both the court of appeals and the district court cited Beck v. Ohio, 379 U.S. 89 (1964) for the test of probable cause to arrest. (App. 114 (district court); App. 166 (court of appeals.) The court of appeals did not conclude that any of the explicit or implicit findings of fact made by the district court were clearly erroneous -- there is, in fact, no mention of any of the district court's findings in the opinion of the court of appeals. Nor did the court of appeals follow its ordinary practice of reading the record in the light most favorable to the appellee.[9/] Rather, as the Director concedes (Resp.Br. 8), the court of appeals reversed because it held "that the facts developed at the evidentiary hearing established probable cause for petitioner's arrest." This a court of appeals may not do:

> On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district court and of this court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under F.R.C.P. 52(a). If it determines that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Dayton Board of Education v. Brinkman, ___ U.S. ___, ___, 97 S.Ct. 2766, 2744 (1977).

9/ See, e.g., Aunt Mid, Inc. v. Fjell-Orange Lines, 458 F.2d 721 (7th Cir. 1972); George v. American Airlines Inc., 295 F.2d 311 (7th Cir. 1961); Lewis Mach. Co. v. Aztec Lines, 172 F.2d 746 (7th Cir. 1959).

The Director has properly withheld the argument, as made in connection with the applicability of F.R.A.P. 4(a) to habeas corpus proceedings (Resp.Br. 46), that the ordinary standards of appellate review are in "direct contravention" of the conformity clause of Civil Rule 81(a)(2). Final orders in habeas corpus proceedings under 28 U.S.C. §2254 are reviewable "on appeal," 28 U.S.C. §2253, and the same standards of appellate review applied in civil and criminal cases are applicable to appeals in habeas corpus cases.[10/]

10/ It is no accident that, as the Court held in Wade v. Mayo, 334 U.S. 672, 683-84 (1948), the "clearly erroneous" standard is applicable to appeals in habeas corpus proceedings.

When Congress extended federal habeas corpus to state prisoners in the Act of February 5, 1867, ch. 38, 14 Stat. 385, it had the option of precluding appellate review entirely, as when it subsequently curtailed the jurisdiction of this Court in the Act of March 27, 1868, ch. 34, ¶2, 15 Stat. 44. See Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868).

Once Congress had determined that there should be appellate review, it had three different forms of review from which to choose. First, review could have been by writ of error, where the reviewing court was limited to consideration of questions of law. See, e.g., Stanley v. Board of Supervisors, 121 U.S. 535 (1887). Second, review could have been by appeal, a form of review made available for equity cases by the Act of March 3, 1802, 2 Stat. 244, §2. Review in equity cases followed the common law model, McCollum v. Eager, 43 U.S. (2 How.) 61 (1844), and factual findings were reviewed under the "clearly erroneous" standard. See, e.g., Furrer v. Ferris, 145 U.S. 132 (1892).

The third form of review that could have been adopted was that then extant in admiralty cases, where additional evidence could be received on appeal. See Former Admiralty Rule 49, promulgated 54 U.S. (13 How.) vi (1851); The Morning Star, 14 F. 866, 867 (C.C.N.D. Ill. 1882) ("It is also a matter of everyday practice for additional testimony to be taken on both sides in the circuit court, and that testimony may entirely change the case as it stood before the district court.")
(cont.)

As we have suggested (Pet.Br. 25), the court of appeals may have reversed on the basis of a Fourth Amendment standard different than that applied by the district court. In our view, the Fourth Amendment standard implicit in the decision of the court of appeals is plainly wrong; if, however, this Court accepts the legal standard applied by the court of appeals, and concludes that notice of appeal was timely, the case must be remanded to the district court for further findings of fact.

(cont)

Rather than limit review to that available by writ of error, or allow a trial de novo on appeal, as in admiralty cases, Congress mandated that the final decision in habeas corpus cases could be reviewed "on appeal." A reviewing court is therefore limited to determining whether factual findings are "clearly erroneous," i.e., whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). And it is the burden of the appellant to "demonstrate that there is no rational basis for the District Judge's decision." United States v. W.T. Grant, 345 U.S. 629, 634 (1953).

II. THE SEIZURE OF PETITIONER'S PERSON WAS CONTRARY TO THE FOURTH AMENDMENT

If the Court chooses to reach the merits of the Fourth Amendment issues in this case, and does not reverse because of the Director's failure to have filed a timely notice of appeal, there are two grounds to hold that the seizure of petitioner's person was contrary to the Fourth Amendment. First, the arresting officers lacked a sufficient quantum of probable cause. (Pet.Br. 27-30.) Second, investigative arrests are per se unlawful unless, at a minimum, they have been authorized by a judicial officer. (Pet.Br. 30-35.)

In an attempt to meet these arguments, the Director seeks to characterize the warrantless arrest of all four teen-age males found in the Browder residence as a "reasonable course of action." (Resp.Br. 16.) In this vein, the Director's brief reads as if this was a case where the police, immediately upon receiving reliable information that a crime had been committed by a teen-age black male whose surname was Browder, and who lived in the 4000 block of West Monroe Street, determined that the only Browder family on that block resided at 4037 West Monroe Street, traveled to that address, learned that there were two persons fitting the description of a dark complected black teen-age male whose surname was Browder, and placed both

under arrest. (Resp.Br. 3-4.) Even viewed in the light most favorable to the respondent -- the losing party in the district court -- the record fails to support this mythical fact pattern.

In this case, two days elapsed before the police decided to act on the information claimed to have been received immediately after commission of the crime in question. (App. 135.) The reliability of this information is uncertain: It came either from the rape victim (App. 130, 140) or from a "known informant." (App. 159, introduced into evidence at App. 148.) Regardless of the source of the information, it lacked specificity. At best, the police believed that the offender sought was a "teen-aged Browder, like 15, 16, 17, 18" (App. 146), who lived in the "4000 block of West Monroe (App. 140), of unknown height and weight. (App. 128.) Once the police determined that a Tyrone Browder, whose address was 4037 West Monroe Street, had an arrest record (App. 139), no attempt was made to determine if another Browder family resided in the 4000 block of West Monroe Street. The multiple suspect arrest was not a response to an unforseen situation; the police claimed to have telephoned ahead to the Browder residence and knew that "the gentlemen would be waiting." (App. 62-63.) Nor is this a case where, after entering the home, the police seized only two teen-age "Browder's." The Director concedes (Resp.Br. 17) that --

contrary to Officer Conroy's testimony in the district court (App. 143) -- all four teen age black males found within the Browder residence were arrested. Finally, the arrests were not made so that the suspects could be charged with an offense; here, petitioner and the three other "suspects" were taken into custody so that they could be placed in a lineup to determine which one, if any, would be identified by an eyewitness.[11/]

The Director's argument that petitioner was arrested on probable cause (Resp.Br. 13-18) is based on a jaundiced view of the facts, and ignores the fact that, as in Wong Sun v. United States, 371 U.S. 471 (1963), there is no showing that the police had narrowed the scope of their search to any particular person.

11/ The blatant investigative purpose of the arrest was admitted by the principal arresting officer in the district court (App. 147-48):

> Q: All right: Isn't it true, sir, that the purpose behind your arrest of the teen-aged Browders was to bring them down to the station to place them in a line-up?
>
> Officer Conroy: To see if they could be identified by the victim. To see which one would be identified, yes, sir.
>
> Q: At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?
>
> A: That is correct, sir.

Contrary to the Director's suggestion (Resp.Br. 17), the fact that all of the black teen-age males found within the Browder residence were placed under arrest cannot be ignored. Seizure of all of the teen-age males found within the dwelling is identical to the seizure of the entire contents of a dwelling condemned as contrary to the Fourth Amendment in Kremen v. United States, 353 U.S. 346 (1953) and Von Cleef v. New Jersey, 395 U.S. 814 (1969). The Director, as the dissenters in Kremen v. United States, supra, would factionalize the seizures, and consider only whether there was "a sufficient factual basis to support a particular arrest." (Resp.Br. 15.) This analysis, if accepted, would undo the protections of the Fourth Amendment "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuente, 428 U.S. 535, 554 (1976).

The Director attempts to analogize the dragnet arrest in this case to a situation where "reasonable grounds exist for the arrest of more than one person," (Resp.Br. 15), such as when a police officer observes two persons standing over a dead man, and each accuses the other of murder. (Resp.Br. 15 n. 3.) But this is not a case in which the police acted as if they had reached the "reasonable conclusion" (Resp.Br. 16) that either petitioner or his

brother had committed the crime under investigation.[12] First, the officers were easily able to differentiate between petitioner and his brother -- petitioner was the only person seized at the Browder dwelling who had his arm in a "bandage or cast." (App. 20, 25.) Second, the possibility that the officers had suspected only the two Browder brothers is undercut by the fact that all four teen-age black males -- including two whose surname was not Browder -- were arrested.

But even if the police had "reasonable grounds" to believe that the offender sought was a "teen-aged Browder, like 15, 16, 17, 18" (App. 146), the investigative seizures must be considered together with the fact that, as in Davis v. Mississippi, 394 U.S. 721 (1969), "the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer." Id. at 728. The Director reads Davis, and its suggestion that investigative detentions might be lawful if undertaken pursuant to a narrowly circumscribed procedure, 394 U.S. at 728, as irrelevant because there was a sufficient quantum of "probable cause" in this case to arrest petitioner, his brother, and any other teenagers whose surname could have been Browder. In our view, the teaching of Davis is

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12/ The Director suggests that the police may have suspected both petitioner and his brother of having perpetrated the crime under investigation. (Resp.Br. 16.) While the eyewitness had described two offenders, she had told the police that one was light-complected and the other dark complected. (App. 126.) As the Director notes (Resp.Br. 16 n. 4): "Both [petitioner and his brother] were dark-complexioned male Negroes."

that detentions for investigation -- as the arrests in this case unabashedly were -- are per se unlawful unless, at a minimum, they are authorized by a judicial officer.

If allowed to stand, the decision of the court of appeals finding that petitioner was lawfully arrested would vest law enforcement officials with the unbridled power to seize a number of suspects to determine which one, if any, should be charged with an offense. This holding destroys the "practical compromise," Gerstein v. Pugh, 420 U.S. 103, 113 (1975), of probable cause, and must be reversed.

IV. THE WARRANTLESS SEARCH OF PETITIONER'S DWELLING WAS CONTRARY TO THE FOURTH AMENDMENT

Even though two days had elapsed before the police decided to act on the information allegedly received from the rape victim the police did not seek a warrant prior to embarking on their expedition to the Browder residence to search for and to seize all teen-aged black males who would be found therein. The Director contends that a person at home does not have a greater right of privacy than when on the public street (Resp.Br. 23-24), and argues that the Fourth Amendment does not require that a disinterested judicial officer warrant the need to search a dwelling when the seizure of a person, rather than the seizure of papers and effects, is sought. (Resp.Br. 25.)

1. To accept the Director's arguments would be to "read the Fourth Amendment out of the Constitution." Coolidge v. New Hampshire, 403 U.S. 443, 480 (1971) (opinion of Stewart, J.) As the Director recognizes (Resp.Br. 20), the primary purpose of the Fourth Amendment was to curb searches made under general warrants in England and writs of assistance in the colonies.[13/] The principal evil of the

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13/ See Stone v. Powell, 428 U.S. 465, 482 (1976); Stanford v. Texas, 379 U.S. 476, 480-86 (1965); Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961); Boyd v. United States, 116 U.S. 616, 624 (1886).

general warrants and writs of assistance was that they placed "the liberty of every man in the hands of every petty officer,"[14/] by allowing searches under unchecked general authority.

The Director would reject the solution adopted by the Framers of the Fourth Amendment to keep "the liberty of every man" out of "the hands of every petty officer" -- the institution of the search warrant, which interposed a disinterested judicial officer between the citizen and arbitrary police power. As the Court explained in McDonald v. United States, 335 U.S. 451 (1948), a "search warrant serves a high function."

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency the Fourth Amendment has interposed a magistrate bewtween the citizens and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing and history shows that the police acting on their own cannot be trusted. So the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that exigencies of the situation made that course imperative. Id. at 455-56.

14/ Boyd v. United States, 116 U.S. 616, 625 (1886), quoting the arguments of James Otis against reissuance of writs of assistance in Boston following the death of George II in 1761. See Wroth & Zobel (eds.), Legal Papers of John Adams, 141-42 (1965).

Apparently, the Director fails to grasp the "point of the Fourth Amendment," as clearly articulated in the oft quoted words of Mr. Justice Jackson in Johnson v. United States, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its prohibition consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competive enterprise of ferreting out crime . . . When the right of privacy must reasonably yield to the right of search is, as a rule- to be decided by a judicial officer, not by a policeman or government enforcement agent. (Id. at 13-14.)

Only last term, the Court reaffirmed the importance of the Warrant clause as the primary safeguard against "unreasonable governmental invasions of legitimate privacy interests." United States v. Chadwick, ___ U.S. ___, 97 S.Ct. 2476, 2483 (1977). It is this safeguard which the Director would eliminate solely because the search of petitioner's dwelling resulted in the seizure of a person, rather than papers or effects.

The point overlooked by the Director is that the Fourth Amendment protects two distinct privacy interests -- the right to be free of unreasonable seizures, and the right to be free of unreasonable searches. See G.M. Leasing Corp.

v. United States, 429 U.S. 338, 352-53 (1976). The requirement that arrests be based on probable cause protects an individual's rights to be free from unreasonable seizures. United States v. Santana, 427 U.S. 38 (1976). But greater interests are at stake in a dwelling search, which involves a separate intrusion into privacy. The "normal Fourth Amendment rule," G.M. Leasing Corp. v. United States, at 358, is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Ibid, quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).[15/]

2. The Director seeks an exception to the "normal Fourth Amendment rule" by relying on "the common law rule" permitting warrantless entries to arrest. (Resp.Br. 21.) But as the Director recognizes (Resp.Br. 20), there is no evidence to suggest that the Framers intended to incorporate such an exception into the Fourth Amendment. This would have been contrary to the broad protections of that amendment against "the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers . . . those involving invasions of the home. . . " United States v. Chadwick, ___ U.S. ___, ___, 97 S.Ct. 2476, 2482 (1977). The nineteenth century state common law opinions which apply this "common law rule"[16/] are in obvious conflict with the development of "the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." United States v. Chadwick, supra.

15/ Contrary to the Director's assertion (Resp.Br. 23), an arrest warrant would have been constitutionally insufficient to authorize the entry of the Browder dwelling which preceded the arrests. See Government of Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974).

An arrest warrant may be secured upon a showing that an offense has been committed, and that there is reasonable ground to believe that a particular person has committed that offense, i.e., that a specific person is "seizable." See Whiteley v. Warden, 401 U.S. 560, 564-66 (1971). The additional privacy interests which yield in a dwelling entry require the added showing that a seizable item is in the place whose search is authorized. See Rugendorf v. United States, 376 U.S. 528, 533 (1964); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

16/ See, e.g., Commonwealth v. Reynolds, 120 Mass. 190 (1876), where the Court stated: "The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the king. It had no application, therefore, to the criminal process." Id. at 196. Reynolds relied upon Commonwealth v. Irwin, 83 Mass. 587 (1861), and was in turn relied upon in State v. Mooring, 115 N.C. 709 (1894). Mooring was cited in Love v. United States, 170 F.2d 32 (4th Cir. 1948), and the Massachusetts cases found their way into the federal reports via two Tennessee decisions. See McCaslin v. McCord, 116 Tenn. 690, 707, 94 S.W. 79, 83 (1906) (dictim); Smith v. Tate, 143 Tenn. 268, 227 S.W. 1026, 1027 (1921); Reichman v. Harris, 252 F. 371, 380 (6th Cir. 1918) (dictim); Gatewood v. United States, 209 F.2d 789, 791 n. 3 (D.C. Cir. 1953) (dictum).

The "common law authorities" were seriously questioned by Judge Prettyman in Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949), and have been rejected by a number of jurisdictions which have considered the vitality of the "common law rule" in light of development of the Fourth Amendment. See Pet.Br. 40 nn. 40, 41. Those jurisdictions which have adhered to the "common law rule" have deferred to this Court's resolution of the question. See, e.g., State v. Perez, 277 So.2d 778, 783 (Fla. 1973); State v. v. Pontier, 95 Ida. 707, 713, 518 P.2d 969, 975 (1975).

3. The Director incorrectly asserts that the Court has "acknowledge[d] the validity of the common law rule permitting warrantless entries [to arrest]." (Resp. Br. 21.) On the contrary, the Court has repeatedly and explicitly reserved consideration of this "grave constitutional question." Jones v. United States, 357 U.S. 493, 499 (1958). See Coolidge v. New Hampshire, 403 U.S. 443, 491-92 (1971) (Harlan, J., concurring); United States v. Santana, 427 U.S. 38, 45-46 (1976) (Marshall, J., dissenting).

Contrary to the Director's contention, Johnson v. United States, 333 U.S. 10 (1948) is flatly incompatible with any notion of a general right of warrantless entry for the purpose of arrest.[17/] In Ker v. California, 374 U.S. 23 (1967), the Court was evenly divided on the lawfulness of the entry, search, and arrest under Fourth Amendment

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17/ In Johnson, narcotics officers had recognized the distinctive odor of burning opium coming from within a hotel room. They knocked and, when Johnson answered, pushed past her into the room, found narcotics paraphernalia, arrested her, and seized it. The Court held the initial entry into the room to be unlawful, and rejected the government's attempt to sustain the entry as incidental to Johnson's arrest. The entry had preceded the arrest, and the fact discovered upon entry, i.e., that Johnson was alone in the hotel room, was held to be necessary to furnish probable cause for her arrest. The entry was therefore unlawful, and tainted all that followed.

While the Court in Johnson did not further discuss the conditions of allowable arrest entry, the Court's analysis in that case assumes that there is no right to enter without a warrant simply on probable cause to arrest. The police were confronted with an occupied room in which opium was burning, and could reasonably believe that someone in that room was committing an offense. This quantum of probable cause, however, was deemed insufficient to allow the arrest entry.

standards,[18/] but the four members of the Court who joined with Mr. Justice Harlan in voting to affirm found exigent circumstances to excuse any need for a warrant. Id. at 40. Neither Miller v. United States, 357 U.S. 301 (1958) nor Sabbath v. United States, 391 U.S. 585 (1968) involved the Fourth Amendment; in both cases, the Court held an entry unlawful because of non-compliance with the "knock and announce" requirements of 18 U.S.C. §3109.

4. The Director's attempt to show exigent circumstances to justify the warrantless home entry (Resp.Br. 28) must be rejected. The unexplained two day delay in following up on the information allegedly provided to the police by the rape victim conclusively shows the absence of any exigency. See G.M. Leasing Co. v. United States, 429 U.S. 338, 361-62 (1976) (Burger, C.J., concurring).

5. The Director's argument that the "mobility factor" (Resp.Br. 23) requires that persons be afforded less protection from dwelling searches than papers or effects is frivolous and has no place in this case, where the police claimed to have telephoned ahead to advise Mrs. Browder that

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18/ Mr. Justice Harlan voted to affirm on the ground (rejected by the other members of the Court) that Fourteenth Amendment standards regulating state police searches and seizures are not coincident with those which the Fourth Amendment imposes on federal officers. 374 U.S. at 44-46.

they were coming for her sons,[19] and where the police had waited two days after allegedly learning that the suspect sought resided in the 4000 block of West Monroe Street before following up on that information. The officers' own testimony shows that this was not a case where an arrest was necessary "now or never." Roaden v. Kentucky, 413 U.S. 496, 505 (1973).

Even if the actions of the police were not sufficent to rebut the possibility of any need for prompt action, the "mobility factor" argument must be rejected. A person is certainly less mobile than flash paper -- which disintegrates when ignited -- or small quantities of narcotics -- which may be promptly disposed of in a toilet. Yet probable cause to believe that any inanimate object -- regardless of the possibility that it might be destroyed upon an arrest entry -- is present within a dwelling does not, in itself justify a search of that dwelling. See Vale v. Louisiana, 399 U.S. 30 (1970). In addition to probable cause to believe that the thing to be seized is within the dwelling, there must be either a warrant, or facts from which the officers could reasonably infer that delay would result in the destruction of evidence. See Preston v. United States, 376 U.S. 364 (1964). Neither was present in this case.

19/ Mrs. Browder denied having participated in such a conversation. (App. 151.)

6. The Director's parade of horribles which, it is asserted, would result from application of the warrant clause to dwelling searches made to seize persons (Resp. Br. 24) is unconvincing. The "'mini pre-arrest hearing' to determine whether warrantless entry is permissible" consists of nothing more than the ex parte decisions which are now made by a law enforcement officer whenever a warrantless search or seizure is undertaken. The need for a post-deprivation judicial determination of the reasonableness of the officer's warrantless actions -- which the Director apparently views as a frivolous luxury -- is necessary to preserve "one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state, where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948). See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80 (1974). Whenever, as in this case, there is no exigency, the officers may avoid the parade of horribles envisoned by the Director by simply applying for a warrant. This is a salutary course of action even when a warrant is not constitutionally required, see Watson v. United States, 423 U.S. 411, 456 n. 22 (1976) (Marshall, J., dissenting), and, if followed in this case, would likely have deterred the police misconduct.

7. The question of whether the alternatives to the warrant clause suggested by the Director (Resp.Br. 25) would be sufficient to satisfy the demands of the Fourth Amendment is not presented in this case, where the police did not have probable cause to arrest any one, specific person, where the seizure of all teen-age black males found within the Browder residence two days after an offense had been committed was not "reasonable," and where there was no attempt to comply with the state prompt arraignment rule. Nor can there be any "strategic incentives for police to obtain warrants where possible" (Resp. Br. 25), when, as here, the State Attorney General vigorously defends the reasonableness of a dragnet arrest, made at night from a dwelling, in the absence of any exigency, and without a search warrant.

8. The Director's claim that the police entry to the Browder residence was consented to by Mrs. Browder (Resp.Br. 26) should have been raised in the district court, when the Director had two opportunities to show that petitioner had been lawfully arrested. The Director cannot claim lack of notice of the warrant issue -- petitioner's application for a writ of habeas corpus asserted that his arrest was unlawful because it "was made without probable cause, without a warrant, and in the absence of exigent circumstances." (Petition, ¶13 (App. 5).)

It is conceivable that the Director has defended this case on the assumption that no court would hold petitioner's arrest unlawful because it was made without a warrant. But as in Whiteley v. Warden, 401 U.S. 560, 569 (1971), this would not justify a remand to the district court so that the Director may attempt to show that there was a voluntary consent to the police entry . This is especially true when, viewed in the light most favorable to petitioner, the evidence shows mere acquiescence to authority, rather than voluntary consent.[20] See Amos v. United States, 255 U.S. 313 (1921); Bumper v. North Carolina, 391 U.S. 543 (1968).

V. HABEAS CORPUS RELIEF IS PRECLUDED BY NEITHER STONE V. POWELL, 428 U.S. 465 NOR BY WAINWRIGHT V. SYKES, ___ U.S. ___ (1977)

The Director argues that consideration of the merits of petitioner's Fourth Amendment claim is precluded by Stone v. Powell, 428 U.S. 465 (1976) and by Wainwright v. Sykes, ___ U.S. ___, 97 S.Ct. 2497 (1977).[21] In our view,

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20/ While the arresting officers claimed to have been invited into the Browder dwelling (App. 142), Mrs. Browder testified that the police, upon arrival, said that they had come for her sons, and when asked "What for?" had responded that they were taking the youths "down for questioning and they would bring them back." (App. 150.) Petitioner's trial testimony (App. 93) corroborated his mother's recollections of the police entry.

21/ The Director apparently concedes that, if its notice of appeal was untimely, the applicability of these cases need not be considered. See Pet.Br. 42 n. 43.

These two cases must be read together to insure that when, as here, a state fails to provide an indigent accused with a full and fair opportunity to raise and have adjudicated a Fourth Amendment claim -- either at trial, on direct appeal, or through state collateral remedies -- the doors of the federal district courts remain open to decide the merits of the federal claim.

1. The Director contends that a prisoner receives the "full and fair opportunity" required by Stone v. Powell whenever a state has provided a procedure in which motions to suppress evidence may be made. (Resp.Br. 38.) While this contention may be applicable to the totality of the New York procedures involved in Gates v. Henderson, ___ F.2d ___ (2d Cir. No. 76-2065, August 19, 1977) (in banc)[22/] it has no place in this case, which arises from the repeated refusal of the Illinois courts to either consider the merits of petitioner's Fourth Amendment claim, or allow him an opportunity to avoid the failure of his appointed trial counsel to have raised the Fourth Amendment claim at trial.

As petitioner's travail through the Illinois courts

22/ In Gates v. Henderson, the Second Circuit convened in banc, received additional evidence (slip op. 5383), and reversed the panel opinion, cited in Pet.Br. 47 n. 52. The case was apparently submitted without re-argument prior to this Court's decision in Wainwright v. Sykes, supra. See slip op. 5361. The concurring opinion of Judge Oakes (slip op. 5381-89) discussed Sykes, and is in accord with our analysis.

reveals, Illinois does not provide any procedure through which a prisoner may demonstrate "cause" and "prejudice" to escape the consequences of a procedural default committed by trial counsel which resulted in the non-assertion of a Fourth Amendment claim. See Pet.Br. 43 n. 44. Absent such procedures, there can never be "full and fair litigation" of a Fourth Amendment claim which is not raised at trial.

Use of mechanical waiver rules as applied by the Illinois courts was rejected in Henry v. Mississippi, 379 U.S. 443 (1965) and again in Wainwright v. Sykes, supra. Rather than a Draconian waiver rule that, regardless of excuse, all claims not raised at trial are irretrievably lost, the due process clause requires that federal courts adjudicate, under 28 U.S.C. §2254, constitutional claims of state prisoners for the first time upon a showing of "cause" and "prejudice." See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L.Rev. 441, 455-57 (1963). The Director, however, would construe "cause" and "prejudice" to replicate the mechanical waiver rules applied by the Illinois courts. (Resp.Br. 29-37). This belated argument, see infra at 32-33, must be rejected.

2. The "cause" and "prejudice" standards of Wainwright v. Sykes, supra, are derived from Shotwell Mfg Co. v. United States, 371 U.S. 341 (1963),[22] where the Court held that there was insufficient cause under F.R.Cr.P. 12(b)(2) to allow a post-trial challenge to grand and petit jury arrays when the alleged illegalities had not resulted in the seating of any unqualified grand or petit juror. Id. at 363 n. 25. Under those circumstances, the Court held that the defendants had not been "prejudiced in any way by the alleged illegalities in the selection of juries." Id. at 363. In this case, however, petitioner was prejudiced because evidence obtained as the result of his unlawful arrest was used to secure his conviction.[23] See Peters v. Kiff, 407 U.S. 493, 508 (1972) (Burger, C.J., dissenting); Alderman v. United States, 394 U.S. 165, 173 (1969).

The Director argues that a person accused of a crime is not "actually prejudiced" when evidence obtained in violation of his Fourth Amendment rights is used to obtain his conviction and imprisonment. (Resp.Br. 34-37.) While this might be true when use of unlawfully obtained evidence results in only harmless error, see Fahy v. Connecticut, 375 U.S. 85, 94-95 (1963) (Harlan, J., dissenting), in this case, as the district court found (App. 117), it cannot be said that use of the fruits of petitioner's unlawful arrest resulted in harmless error. See Whiteley v. Warden, 401 U.S. 560, 569 n. 13 (1971).

3. We disagree with the Director's contention (Resp.Br. 31-33) that the present record fails to establish the "cause" required by Wainwright v. Sykes, supra.[24] When, as here, the record shows that a prisoner was represented by court appointed counsel, that counsel failed to raise a meritorious constitutional claim, and that assertion of that claim would have emasculated the prosecution's case, a prisoner has made out a prima facie case of "cause." As in any other lawsuit, once the proponent has made out a prima facie case, the burden of coming forward with evidence shifts to the opposing party. See Hazelwood School District

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22/ Shotwell was applied in Davis v. United States, 411 U.S. 233 (1973) to preclude adjudication, absent a showing of "cause" and "prejudice," of claims of an unlawfully selected grand jury in a motion under 28 U.S.C. §2255 which could have been raised prior to trial. Davis was applied to jury discrimination claims raised by a state prisoner under 28 U.S.C. §2254, but not previously adjudicated in state court proceedings, in Francis v. Henderson, 425 U.S. 536 (1976). Wainwright v. Sykes, supra, applied Francis to all constitutional claims raised by a habeas petitioner which had not been adjudicated in the state courts.

23/ The Director had abandoned the claim, raised in the court below, that petitioner's alleged oral confession was free of any taint flowing from the arrest. See Appellant's Brief, 7th Cir., No. 76-1089, at 11-13.

24/ This is not to say that a stronger showing of "cause" would not have been made had the Director raised this issue in the district court when the waiver question was at issue. For example, we would have proved that trial counsel would only file pre-trial motions for which mimeographed forms had been prepared by the Public Defender's office, and that no form had been prepared to suppress the fruits of a warrantless arrest. We would have also have sought to show that, as in other cases, trial counsel was reluctant to present a vigorous defense lest he antagonize the trial judge, and thereby lose his coveted position as a trial assistant in the Public Defender's office.

v. United States, ___ U.S. ___, ___ 97 S.Ct. 2736, 2745 (1977) (Stevens, J., dissenting).

In the district court, where the waiver issue was considered under the standards of United States ex rel. Allum v. Twomey, 484 F.2d 734 (7th Cir. 1973) -- standards virtually identical to those adopted by this Court in Wainwright v. Sykes, supra -- the Director declined to come forward with any evidence to rebut the prima facie showing made out on the state trial record. On the contrary, the Director relied on the state court record as showing that, under United States ex rel. Allum v. Twomey, supra, "[c]ounsel made a reasonable choice not to challenge the legality of the arrest but to rely instead on the character of the evidence against petitioner." (Record Item No. 10, at 2.)

Having failed to exercise its opportunity to rebut petitioner's prima facie case in the district court, and after having acquiesced in the district court's finding of no waiver on appeal, the Director now asserts that petitioner has shown insufficient "cause" to excuse the failure of his court appointed trial attorney to have raised the Fourth Amendment issue at trial. This litigation strategy is identical to the "sandbagging" feared by the Court in Sykes, at ___, 97 S.Ct. at 2508, and should not be countenanced. The Court should therefore decline to

consider this belated claim of waiver. See Adickes v. Kress, 398 U.S. 144, 147 n. 2 (1970); Whiteley v. Warden, 401 U.S. 560, 569 (1971).

4. The Director attempts to defend the failure of petitioner's appointed trial counsel to have raised the Fourth Amendment claim as reasonable "in light of the status of the law in Illinois at the time." (Resp.Br. 32.) Petitioner's trial commenced in 1971, however, two years after this Court's decision in Davis v. Mississippi, 394 U.S. 721 (1969), and four years after the President's Commission on Law Enforcement and the Administration of Justice had concluded that "there is no legal basis for arresting persons simply as a means of detaining them while an investigation of their possible involvement in a crime is conducted. Ibid, Task Force Report: The Police 186 (1967). The Illinois Supreme Court had long prior to petitioner's trial adopted a generous intepretation of the "fruit of the poisonous tree doctrine," People v. Albea, 2 Ill.2d 317, 118 N.E.2d 277 (1954), and it simply cannot be said that it was "reasonable" for appointed trial counsel to withhold petitioner's Fourth Amendment claim. In addition, as Justice (then Judge) Stevens concluded in Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), counsel has a duty to raise "points which may ultimately support a federal constitutional claim even though foreclosed as a matter of state law." Id. at 483.

[to be inserted at the top of page 35]

5. The Director's reliance (Resp.Br. 33) on petitioner's failure to have asserted a Sixth Amendment claim in federal proceedings is misplaced. First, as Tollett v. Henderson, 411 U.S. 258 (1973) teaches, a different standard of incompetency is required to show a deprivation of Sixth Amendment rights than to allow adjudication of a constitutional claim not asserted in state court proceedings. Second, there is no reasonable inference which arises from petitioner's failure to have included a Sixth Amendment claim in his habeas petition: At the time proceedings were commenced in federal court, petitioner had not clearly exhausted state remedies on this issue. See United States

ex rel. Bonner v. Warden, 422 F.Supp. 11 (N.D.Ill. 1976), aff'd 553 F.2d 1091 (7th Cir. 1977). Amending the petition after this issue had been exhausted would only have protracted the already delayed adjudication of the Fourth Amendment issue. Finally, the Director's reliance (Resp. Br. 39 n. 16) on footnote six in LiPuma v. Commissioner, ___ F.2d ___ (No. 77-2006, 2d Cir., July 11, 1977) for the proposition that Stone v. Powell, 428 U.S. 465 (1976) requires that the failure of counsel to have raised a Fourth Amendment claim be excluded from review of counsel's competency, must be considered in light of the "farce and mockery" standard extant in the Second Circuit. See Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976). A different result would be reached under the more modern standards followed in the majority of the courts of appeals.[25/]

6. The Director's primary response to our argument (Pet.Br. 47-50) that Stone v. Powell, supra, should not be extended to a case involving egregious police misconduct is to repeat its contention that the blatantly investigative arrests in this case were reasonable. (Resp. Br. 41.) The Director also relies on the fact that the

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25/ See, e.g., United States v. DeCoster, 497 F.2d 1197 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (in banc); Marzullo v. Maryland, ___ F.2d ___ (No. 76-1946, 4th Cir., September 2, 1977); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States ex rel. Williams v. Twomey, 510 F.2d 635 (7th Cir. 1975); United States v. Easter, 539 F.2d 663 (8th Cir. 1976); United States v. Rivas, 3 M.J. 282 (C.M.A. 1977).

court of appeals held the arrest to be lawful, but, as we have previously demonstrated, this conclusion was incorrect, and was based on an improper view of the facts. Finally, in further support of the need for habeas corpus review of Fourth Amendment questions involving egregious police misconduct, where the state courts have misconceived the federal rights involved, we note the recent observation of Mr. Chief Justice Burger:

> This Court cannot, of course, give plenary consideration to every erroneous holding, and I have no doubt that limitations of time and a crowded docket weigh heavily in the decision denying review. New York v. Earl, ___ U.S. ___, ___, 97 S.Ct. 2663, 2666 (1977) (Burger, C.J., dissenting from denial of cert.)

For all of these reasons, assuming that the Court chooses not to reverse on the jurisdictional question, neither Stone v. Powell, supra, nor Wainwright v. Sykes, supra, would preclude relief on the Fourth Amendment issues presented in this case.

Conclusion

For the reasons above stated, petitioner reiterates his request that the decision of the court of appeals be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus. In the alternative, the case should be remanded to the district court for resolution of disputed questions of fact resolved in the first instance by the court of appeals.

In addition, the court of appeals should be directed to release its decision in this case for publication free of any restrictions on citation.

Respectfully submitted,

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